
**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

BRYAN M. WINDMEYER,

Respondent,

v.

STATE OF WASHINGTON,

Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

This Court should reverse the trial court's order which assessed against the Department of Social and Health Services (DSHS) the cost of a competency evaluation performed by a non-DSHS, court-appointed evaluator. There is no legal authority to support assessment of that evaluation cost against DSHS. The response brief filed by the Pierce County Prosecutor, and joined by the Pierce County Department of Assigned Counsel (collectively referred to as "the county"), relies on inapplicable statutes. The relevant statutes establish the county, and not DSHS, was responsible for the cost of the evaluation in this case.

II. ADDITIONAL STATEMENT OF THE CASE

The trial court initially ordered a competency evaluation of the criminal defendant in this case to be performed by DSHS at Western State Hospital. Clerk's Papers (CP) at 4-7; Supp. CP ____ (Corrected Order for Evaluation by Western State Hospital).¹ DSHS complied with that order by designating a qualified DSHS evaluator to complete the evaluation. Report of Proceedings dated March 1, 2013 (1 RP) at 4; Report of

¹ The Corrected Order for Evaluation by Western State Hospital, filed on September 18, 2012, and attached hereto as Appendix A, was included in DSHS's original Designation of Clerk's Papers. However, a different, undesignated pleading from the same date was provided by the Clerk's Office (CP at 8-9) and mistaken for the Corrected Order for Evaluation. DSHS has filed a Supplemental Designation of Clerk's Papers to ensure a complete record in this case, but the Corrected Order for Evaluation has not yet been filed by the Clerk's Office. *See* RAP 9.6(a).

Proceedings dated March 29, 2013 (2 RP) at 3. But the county prosecutor declined to approve the DSHS-designated evaluator. 1 RP at 3-4; 2 RP at 3. Consequently, the trial court entered a subsequent and final order which appointed a non-DSHS evaluator, Dr. O’Neal, who was approved by the county prosecutor. CP at 10-14. The order also required the evaluation to take place at the Pierce County Jail. CP at 11. The county then argued DSHS should be ordered to pay the cost of the non-DSHS evaluator. 1 RP at 3-4. The trial court assigned the cost to DSHS, but stayed the order pending appeal. CP at 27. After DSHS appealed and filed an opening brief, the county paid the disputed cost of the evaluation and then argued for dismissal on the basis of mootness. This Court ruled the issue was not moot. The county then filed its response brief.

III. ARGUMENT

The county’s response brief inaccurately implies that this Court must review the legal issue on appeal for an abuse of discretion; it mistakenly relies on two statutes—RCW 10.77.020 and RCW 10.77.250—which do not apply to this case; and it proffers a red herring by claiming DSHS can seek reimbursement from the convicted defendant under RCW 10.01.160.

The correct standard of review is de novo. Neither RCW 10.77.020 nor RCW 10.77.250 shifts the financial responsibility in this case from the county to DSHS. And RCW 10.01.160 provides that either DSHS *or* the county may seek reimbursement for the cost of an evaluation, depending on the circumstances. The circumstances in this case required the county to pay for the cost of the competency evaluation.

A. The Issue in This Case Is Subject to a De Novo Standard of Review

The county implies that the legal issue in this case is reviewed under an “abuse of discretion” standard. Brief of Respondent (Br. Respondent) at 4. This is implied by the county’s assertion within its argument heading that “the trial court did not abuse its discretion.” Br. Respondent at 4. But the county offers no legal authority explaining why an abuse of discretion standard would be applicable in this case. It is not.

The issue in this case is purely an issue of law. It is determined by statutory construction, and therefore reviewed by this Court de novo. *State v. Pannell*, 173 Wn.2d 222, 227, 267 P.3d 349 (2011). Even if the county’s asserted standard was correct, the trial court’s order in this case should be reversed because a decision reached by applying the incorrect

statute, as the trial court did, constitutes an abuse of discretion. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

B. The County Cannot Rely on RCW 10.77.020 to Avoid Its Responsibility to Pay for the Non-DSHS Evaluation in This Case

The county continues to mistakenly rely on an inapplicable statute, RCW 10.77.020(2). Br. Respondent at 5. That statute describes a defense expert, who is appointed on behalf of a defendant to provide psychiatric assistance in preparation for a criminal defense. If the defendant is indigent, then the defense expert will be compensated by DSHS in an amount DSHS determines to be fair and reasonable. RCW 10.77.020; WAC 388-875-0040.

RCW 10.77.020(2) does not apply in this case because the appointed evaluator, Dr. O'Neal, was not a defense expert. Rather, Dr. O'Neal was appointed to conduct a competency evaluation of the defendant, which is a different responsibility, and authorized pursuant to a different statute, RCW 10.77.060(1). Further, Dr. O'Neal was a non-DSHS expert, appointed by the trial court after the prosecutor declined to approve the qualified DSHS-designated expert as the competency evaluator.

As a general matter, counties are responsible for the cost of administering criminal laws within their boundaries and are not entitled to reimbursement from the state. *See State v. Agren*, 32 Wn. App. 827, 828, 650 P.2d 238 (1982), *modified*, 660 P.2d 1145 (1983). And a court-ordered competency evaluation is a cost incurred in the course of prosecuting a criminal defendant. RCW 10.01.160. The statute which actually governs Dr. O’Neal’s appointment, RCW 10.77.060(1), does not alter this division of financial responsibilities by imposing upon DSHS financial responsibility for the cost of an evaluation performed by a non-DSHS expert.

Nevertheless, the county claims DSHS is responsible by arguing, “DSHS cannot fulfill its obligation under the statute by designating an expert who is *not* approved by the prosecuting attorney. The prosecutor cannot be acting improperly by exercising a right given to it by the Legislature.” Br. Respondent at 7. This is a misunderstanding of the relevant law, and a mischaracterization of DSHS’s argument.

DSHS fulfilled its obligation by designating a qualified expert evaluator. *See* RCW 10.77.060(4) (DSHS is not required to designate more than one qualified evaluator). And DSHS is not alleging the prosecutor acted “improperly” in refusing to approve the qualified DSHS-designated evaluator. Once DSHS designates a qualified evaluator,

the prosecutor has a choice: (1) approve the DSHS evaluator, in which case DSHS bears the cost of the evaluation; or (2) do not approve the DSHS evaluator, and request appointment of a non-DSHS evaluator, in which case the county bears the cost of the evaluation.

The county cannot avoid financial responsibility for the cost of Dr. O'Neal's competency evaluation by transposing language from an inapplicable statute (RCW 10.77.020) onto the applicable statute (RCW 10.77.060).

C. The County Cannot Rely on RCW 10.77.250 to Avoid Its Responsibility to Pay for the Non-DSHS Evaluation in This Case

The county also argues inaccurately that DSHS is responsible for the evaluation cost under RCW 10.77.250. Br. Respondent at 6. That statute provides that DSHS "shall be responsible for all costs relating to the evaluation and treatment of persons *committed to it* pursuant to any provisions of this chapter, and the logistical and supportive services pertaining thereto." RCW 10.77.250 (emphasis added). Commitment within this context "means the determination by a court that a person should be detained for a period of either evaluation or treatment, or both, in an inpatient or a less-restrictive setting." RCW 10.77.010(2).

RCW 10.77.250 does not apply in this case. *See Utter v. State Dep't of Soc. & Health Services*, 140 Wn. App. 293, 301-03, 165 P.3d 399 (2007). *Utter* is the only opinion to directly analyze the application of this statute. In that case, this Court explicitly held RCW 10.77.250 does not apply to the direct costs of a competency evaluation. *Id.* at 302-03. Rather, responsibility for that cost is governed by RCW 10.01.160 because it is a cost specially incurred in prosecuting the defendant. *Id.*; RCW 10.01.160(2).² Because the only cost at issue in this case is the direct cost related to the defendant's competency evaluation, RCW 10.77.250 does not apply.

Even if RCW 10.77.250 did apply, generally, to the direct costs of a competency evaluation, DSHS should not be financially responsible for the evaluation in this case. Although the trial court initially ordered the competency evaluation to take place at Western State Hospital, the initial order was followed by a subsequent—and final—court order which required the evaluation to be performed at the Pierce County Jail by a non-DSHS evaluator. The trial court entered this succeeding order

² After the *Utter* decision, the Legislature added a subsection to RCW 10.01.160, which confirmed the holding that RCW 10.77.250 does not apply to the direct cost of a competency evaluation. *See* Laws of 2008, ch. 318, § 2 (*codified as* RCW 10.01.160(5)). The amendment also clarified that (1) both DSHS and “other governmental units,” like counties, may seek reimbursement of the evaluation cost if the defendant is ultimately convicted; and (2) even if the defendant is not convicted, DSHS and other governmental units may seek reimbursement—under any applicable statute—from the defendant for other medical or mental health treatment provided while criminal proceedings are stayed pursuant to RCW 10.77.084. *Id.*

because the county prosecutor declined to approve the qualified DSHS-designated evaluator. Consequently, the defendant was never sent to Western State Hospital or evaluated by DSHS. This is in contrast to the defendant in *Utter*, whose evaluation was performed by DSHS at Western State Hospital. *Utter*, 140 Wn. App. at 297-98. The final trial court order in this case removed from DSHS the responsibility to evaluate the defendant and, importantly, ordered the evaluation to be completed at the county jail by a non-DSHS expert approved by the county prosecutor. So even if RCW 10.77.250 is interpreted to assign to DSHS, generally, the evaluation costs of defendants who are committed to DSHS, it should not apply under the circumstances of this case, where DSHS never took custody of the defendant or evaluated him, and instead the evaluation was ordered to be done in the Pierce County Jail by a non-DSHS evaluator.

D. RCW 10.01.160(5) Undermines the County's Argument

The county also claims that “DSHS is not without recourse” because it may seek reimbursement of the evaluation cost from the convicted defendant in this case, pursuant to RCW 10.01.160(5). Br. Respondent at 7. This is a red herring.

The relevant issue in this appeal is whether the trial court had the authority—in the first place—to assess against DSHS the cost of the competency evaluation. The issue is not whether DSHS can later seek

reimbursement of that cost against an indigent defendant. In any event, RCW 10.01.160(5) undermines the county's argument because it reveals that counties, and not DSHS only, may be financially responsible for the cost of a competency evaluation. Under the county's interpretation of RCW 10.77.060 and RCW 10.77.250, there is no scenario in which DSHS would *not* be responsible for the cost of a competency evaluation. That interpretation is erroneous because it would render superfluous the language in RCW 10.01.160(5) which authorizes "other governmental units," aside from DSHS, to seek reimbursement for the cost of a competency evaluation. The county's interpretation would also conflict with recently passed legislation, which establishes that counties are generally responsible for the cost of court-appointed, non-DSHS evaluators, and that DSHS must reimburse the county only in specific circumstances. *See* Laws of 2013, ch. 284, § 1 (*codified as* RCW 10.77.073(1)).

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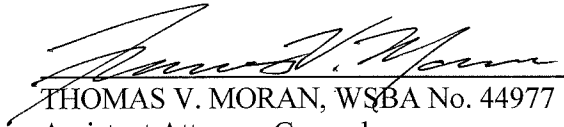
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IV. CONCLUSION

This Court should reverse the trial court's order and hold that the county is responsible to pay for the cost of a competency evaluation performed by a non-DSHS evaluator, who was appointed by the trial court because the county prosecutor declined to approve a qualified DSHS-designated evaluator.

RESPECTFULLY SUBMITTED this 26th day of March, 2014.

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CERTIFICATE OF SERVICE

Jeffrey S. Nelson, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. On March 26 2014, I served a true and correct copy of this **REPLY BRIEF OF APPELLANT** and this **CERTIFICATE OF SERVICE** on the following parties to this action, as indicated below:

Counsel for Respondent

Mary Katherine Young High
Attorney at Law
Department of Assigned Counsel
949 Market Street, Suite 334
Tacoma, WA 98402

- ☒ **By United States Mail**
☐ By Legal Messenger
☐ By Facsimile
☒ **By E-mail COA Portal:** (MHigh@co.pierce.wa.us)
☐ By Hand Delivery by: _____

Pierce County Prosecutor

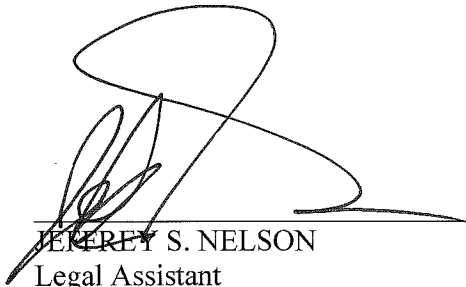
Kathleen Proctor
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Pierce County Prosecutor's Office
930 Tacoma Avenue South, Suite 946
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- ☒ **By United States Mail**
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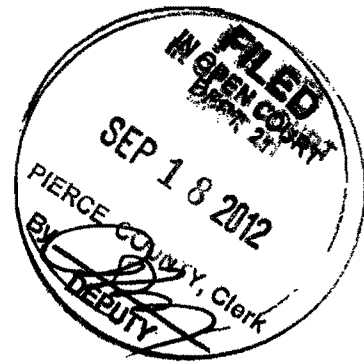
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 26th day of March 2014, at Tumwater, Washington.



JEREMY S. NELSON
Legal Assistant

APPENDIX A



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

BRYAN MICHAEL WINDMEYER,

Defendant.

CAUSE NO. 12-1-01499-1

*CORRECTED*ORDER FOR EVALUATION BY
WESTERN STATE HOSPITAL
(Preliminary Evaluation)

THIS MATTER coming on in open court upon the motion of the COURT/STATE/
DEFENDANT, and there may be reason to doubt the defendant's fitness to proceed and there
may be entered a mental defense, and the court being in all things duly advised, now, therefore,
IT IS HEREBY

ORDERED, under the authority of RCW 10.77.060, that the defendant, BRYAN
MICHAEL WINDMEYER, who is charged with the crime(s) of Unlawful Possession of a Stolen
Vehicle; Assault in the First Degree; Felony Harassment; Unlawful Possession of a Firearm in
the First Degree; Vehicle Prowling in the Second Degree be evaluated by qualified member(s) of
the staff of Western State Hospital who is designated by the Secretary of the Department of
Social and Health Services, and one expert shall be approved by the prosecuting attorney. The

ORDER FOR EXAMINATION BY
WESTERN STATE HOSPITAL -1Department of Assigned Counsel
949 Market St., Ste 334
Tacoma, WA 98402
Telephone: (253) 798-6062

evaluation may include psychological, and medical tests and treatment, and shall be completed as specified below:

☒ **DEVELOPMENTAL DISABILITIES PROFESSIONAL:** The court has been advised by a party to the proceedings that the defendant may be developmentally disabled and hereby orders that at least one expert be qualified as a developmental disabilities professional.

A. PRELIMINARY EVALUATION AT PIERCE COUNTY JAIL

☐ (1). IT IS HEREBY ORDERED that the evaluation shall take place in the Pierce County Jail, unless the evaluator determines that the evaluation should take place at Western State Hospital. Then the Pierce County Sheriff's Department shall transport the defendant to Western State Hospital, for a period of confinement not to exceed fifteen days from the time of admission to the hospital. At the end of such period of evaluation and testing, the defendant shall be returned to the custody of the Pierce County Jail. The report is to be submitted to this court in writing two working days following the final evaluation of the defendant, unless the court grants further time. If the defendant is released from jail prior to the evaluation, the defendant shall contact the staff at Western State Hospital at 253-761-7565 within the next working day following his/her release from jail to schedule an appointment for evaluation at a facility.

☐ A(2). In the event the defendant is committed to the hospital for evaluation, all parties **agree to waive the presence of the defendant** or to his/her remote participation at a subsequent competency hearing or the presentation of an agreed order if the recommendation of the evaluator is for continuation of the stay of criminal proceedings or if the defendant remains incompetent and there is no remaining restoration period, and the hearing is held prior to the expiration of the authorized commitment period.

B. PRELIMINARY EVALUATION OUT OF CUSTODY

☐ IT IS HEREBY ORDERED that as the defendant is not currently in custody, the defendant and/or his/her attorney shall contact the staff at Western State Hospital at 253-761-7565 within the next working day following the date of this order to schedule an appointment for evaluation at a facility. The evaluation shall occur, and the report submitted to this court, within twenty-one days of the receipt of the order, the charging documents and the discovery by Western State Hospital, unless the court grants further time.

C. PRELIMINARY EVALUATION AT WESTERN STATE HOSPITAL.

☒ IT IS HEREBY ORDERED that the evaluation is to occur at Western State Hospital and the defendant is hereby committed to the care of the Division of Social and Health Services for up to fifteen days from the date of admission to the hospital. The Sheriff of Pierce County shall forthwith transport the defendant to Western State Hospital for the evaluation, and at the end of such period of evaluation and testing return the defendant to the custody of the Pierce County Jail to be held pending further proceedings against the

12-1-01499-1

defendant. The report shall be furnished to the court in not less than two working days following the final evaluation of the defendant. **The court may order the defendant to Western State Hospital without a preliminary assessment at the Pierce County Jail only if one of the following criteria are met:**

- ☐ The defendant is charged with **murder in the first degree or murder in the second degree;**
- ☒ The court finds that it is **more likely than not that an evaluation in the jail will be inadequate to complete an accurate evaluation;** or
- ☒ The court finds that an evaluation outside the jail setting is **necessary for the health, safety, or welfare of the defendant.**

IT IS FURTHER ORDERED that the staff of Western State Hospital shall file the report with the undersigned Court, and provide copies to the Prosecuting Attorney, the Defense Counsel and others as designated in RCW 10.77.060 and 10.77.065. The report of the evaluation shall include the following pursuant to RCW 10.77.060:

1. A description of the nature of the evaluation;
2. A diagnosis of the defendant's mental condition;
3. ☒ **COMPETENCY:** *an opinion as to the defendant's capacity to understand the proceedings and to assist in defendant's own defense.*
4. An opinion as to whether the defendant should be evaluated by a County Designated Mental Health Professional under RCW 71.05.

The following opinions are to be given only if the evaluator or court determines that the defendant is competent to stand trial.

☐ **SANITY:** an opinion as to the extent, at the time of the offense, as a result of mental disease or defect, the defendant was unable to either perceive the nature and quality of the acts with which the defendant is charged, or to know right from wrong with reference to those acts **(only required when the defendant has indicated his or her intention to rely on the defense of insanity and has provided an evaluation and report by an expert or professional person concluding that the defendant was criminally insane at the time of the alleged offense):**

☐ **SAFETY:** an opinion as to whether the defendant is a substantial danger to other persons or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons;

The Staff is further required to give an opinion as to whether further evaluation and testing is required. IT IS FURTHER

ORDERED that the staff of Western State Hospital is granted access to the defendant's medical records, whether they are located at the Pierce County Jail, at Western State Hospital or any other clinic or hospital for the purpose of conducting the evaluation. IT IS FURTHER

ORDERED that this action be stayed during this evaluation period and until this court enters an order finding the Defendant to be competent to proceed. The next hearing date is

9-21-12


IT IS FURTHER

|| ORDERED that defense counsel shall be notified and given the opportunity to be present at the evaluation.

DONE IN OPEN COURT this 7th day of Sept, 2012.


Presented by:


JUDGE/COMMISSIONER
Frank E. Cuthbertson


MARY K. HIGH, WSBA #20123
Attorney for Defendant

Phone Number: 253-798-7857 FAX Number: 253-798-6715 Email: mhigh@co.pierce.wa.us

Approved as to Form, Copy Received:


SABRINA M. AHERENS, WSBA #32184
Deputy Prosecuting Attorney

Phone Number: 253-798-6510 FAX Number 253-798-6510 Email: sahrens@co.pierce.wa.us

Defendant was notified in open court.
Defendant



ORDER FOR EXAMINATION BY
WESTERN STATE HOSPITAL -4

Department of Assigned Counsel
949 Market St., Ste 334
Tacoma, WA 98402
Telephone: (253) 798-6062

Reply Brief of Appellant
Appendix A - Page 4 of 4

WASHINGTON STATE ATTORNEY GENERAL

March 26, 2014 - 1:01 PM

Transmittal Letter

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